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FILE COPY

No. 69

In the Supreme Court of the United States

OCTOBER TERM, 1940

RECONSTRUCTION FINANCE CORPORATION, PRUDENCE BONDS CORPORATION, PRESIDENT AND DIRECTORS OF THE MANHATTAN COMPANY, AND THE MARINE MIDLAND TRUST COMPANY OF NEW YORK, PETITIONERS,

v.

PRUDENCE SECURITIES ADVISORY GROUP, LIMITED, ET AL.

BRIEF FOR THE PETITIONERS

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v.

PRUDENCE SECURITIES ADVISORY GROUP, INDEPENDENT PRUDENCE BONDHOLDERS COMMITTEE, ET AL.

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinions in the Circuit Court of Appeals for the Second Circuit (R. 319–328) are reported in 111 F. (2d) 37.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on April 23, 1940 (R. 330–337). The petition for a writ of certiorari was filed on May 8, 1940, and granted on June 3, 1940 (R. 330). The

jurisdiction of this Court is conferred by Section 24 (c) of the Bankruptcy Act and by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Timely notices of appeal from orders making allowances in a reorganization proceeding were filed with the District Court in reliance upon a decision of the court below in a previous case denying an application for leave to appeal on the ground that appeals from allowance orders lay as a matter of right and therefore should be taken in the manner here followed. The present appeals were heard on the merits and were submitted to the court for decision. Thereafter, this Court resolved a conflict between the decision relied on in taking the appeals and a later decision of the Circuit Court of Appeals for the Seventh Circuit, by holding that appeals from orders granting allowances are discretionary with the Circuit Court of Appeals. The questions are:

1. Was the failure to apply to the court below within the appeal period for an order allowing the appeals a jurisdictional defect requiring the dismissal of the appeals?

2. Was the court below compelled, under Section 250 of the Bankruptcy Act, to dismiss the appeals because application was not made within the appeal period to have the appeals allowed?

3. Did the papers filed with the court below during the appeal period regarding certain of the appeals constitute a sufficient basis for the exercise of that court's discretion to allow those appeals?

4. Was the court below compelled to give retroactive effect to the subsequent decision of this Court, if applicable, and to dismiss the appeals for want of jurisdiction?

STATUTES AND RULE INVOLVED

The pertinent provisions of the Bankruptcy Act, as amended, of the Judicial Code, and of Rule 73 (a) of the Federal Rules of Civil Procedure are found in Appendix A, *infra*, pp. 73–75.

STATEMENT

In the course of the reorganization of Prudence-Bonds Corporation, Debtor, under Section 77B of the Bankruptcy Act, the District Court by 16 orders awarded allowances in excess of $1,105,000 (R. 1–49, 166–182), payable from trust funds securing bonds of the Debtor held by over 35,000 bondholders (R. 73, 77, 199, 306).[1] By some of these orders the District Court also denied various applications for allowances. A large number of appeals were taken by interested parties, both from those parts of the orders which allowed compensation and those parts which denied com-

[1] Additional amounts in excess of $350,000 had previously been paid out for interim allowances and expenses (R. 62, 248, 306).

pensation (R. 52–160, 182–222). Involved in the present case are numerous appeals from the provision of the orders granting allowances.[2]

The questions here presented arise also in the following cases pending on petitions for writs of certiorari: *Manufacturers Trust Co. et al.* v. *Prudence Securities Advisory Group et al.*, No. 210; *Endelman et al.* v. *Prudence-Bonds Corp. et al.*, No. 211; *Kelby* v. *Prudence Securities Ad-*

[2] Reconstruction Finance Corporation (hereinafter referred to as RFC) and Prudence-Bonds Corporation, the new corporation formed pursuant to the plan of reorganization (hereinafter referred to as the New Corporation) appealed from such orders (R. 92–141, 189, 207) on the ground that many of the awards and the total cost of reorganization were grossly excessive (R. 61, 78, 200, 247). They were permitted by the District Court to take the appeals (R. 84, 88, 188, 206), because the 77B Trustees of the Debtor took the position that they had been superseded by the New Corporation and did not consider it their duty to oppose the applications (R. 83). The interests of RFC, an intervenor, in the allowances are (a) its unpaid balance of $11,800,000 on a defaulted loan to The Prudence Company, Inc., holder of $1,910,300 of the subordinated bonds of the Debtor, (b) its holdings, as owner or pledgee, of all the stock of Realty Associates, Inc., and Realty Associates Securities Corporation, which held $1,300,000 of the Debtor's bonds, and (c) the right given to it under the general plan of reorganization, as holder of all the Debtor's stock, to purchase shares in the reorganized company (R. 67–68).

The New Corporation has succeeded to all the rights of the Debtor and its 77B Trustees in the trust funds securing the bonds (R. 75, 229).

The President and Directors of the Manhattan Company and The Marine Midland Trust Company of New York appealed from the amounts awarded them as well as from the provision deferring payment of part thereof (R. 216, 221).

visory Group et al., No. 214; *Prudence Realization Corp.* v. *Prudence-Bonds Corp. et al.*, No. 259; *Davison* v. *Prudence Securities Advisory Group et al.*, No. 273; *Denham* v. *Munson Line, Incorporated*, No. 284. All but the last-named case arose out of the reorganization of the Debtor.

The appeals were all taken by filing, within the appeal period provided by Section 25 (a) of the Bankruptcy Act, notices of appeal in the District Court (R. 92–160, 189, 207–221, 301–302). This was in reliance upon the controlling decision of the court below in *London* v. *O'Dougherty*, 102 F. (2d) 524, which denied an application for leave to appeal from reorganization allowances on the ground that such leave was unnecessary.

Some of the appeals were argued in May 1939, the balance in February 1940 (R. 307, 310). After hearing argument on the first group of appeals the court below reversed that part of one of the orders appealed from whereby the District Court had deferred consideration of certain applications for allowances. Pending the further action which it directed the District Court to take (R. 162), the court below reserved decision on the remaining appeals (R. 307–308). After the District Court had made a further order fixing additional allowances, but withholding payment of the major portion, appeals were taken from that order by the petitioners and others (R. 189, 207–222), and this group of appeals was likewise heard by the court below (R. 310).

On December 4, 1939, prior to the decision on the merits in any of the appeals, the Prudence Securities Advisory Group and its attorneys moved to dismiss the appeals of RFC and the New Corporation from the orders awarding allowances to the moving parties, upon the ground that no petition for leave to appeal had been filed in the Circuit Court of Appeals (R. 276–279). This motion was based upon the contention that the court below should overrule its decision in *London* v. *O'Dougherty, supra,* in view of the subsequent decision of the Circuit Court of Appeals for the Seventh Circuit in *In re Albert Dickinson Co.,* 104 F. (2d) 771. The motion was denied by order of December 7, 1939 (R. 279–280).

On March 11, 1940, this Court, in reviewing the decision of the Circuit Court of Appeals for the Seventh Circuit in the *Dickinson* case, *sub nom. Dickinson Industrial Site* v. *Cowan,* 309 U. S. 382, held that under Section 250 of the Bankruptcy Act appeals from orders on allowances in reorganization proceedings could be heard only in the discretion of the appellate court. After this decision, a motion for reargument of the motion to dismiss the appeals of RFC and the New Corporation was granted and the motion to dismiss was heard, together with a similar motion to dismiss other appeals, made by another committee and its attorneys (R. 287–300). In affidavits submitted in opposition to these motions, RFC and the New Corporation asked that, if further application to have the

appeals allowed should be deemed necessary, such an application be deemed made by them on the basis of the papers theretofore filed in the appellate court (R. 310, 312).[3]

The motions to dismiss were granted by a divided court on April 5, 1940. The court also dismissed the remainder of the appeals on its own motion (R. 326).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

(1) In dismissing the appeals for want of jurisdiction;

(2) In holding that an appeal under Section 250 cannot be allowed unless allowance is applied for within the appeal period;

(3) In failing to treat the appeals taken as of right as appeals in the discretion of the appellate court;

(4) In failing to hold that the papers filed with it during the appeal period regarding certain of the appeals constituted a sufficient basis for the exercise of its discretion to allow those appeals; and

(5) In giving retroactive effect to the *Dickinson* decision.

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[3] As more fully developed later in this brief, RFC and the New Corporation had also, within the appeal period, made motions to consolidate certain of the appeals and to have them heard on the original papers. The affidavits in support of the motions set forth all material facts which would have been relevant for an application for allowance of the appeals (see pp. 47–48, *infra*).

SUMMARY OF ARGUMENT

In *Dickinson Industrial Site* v. *Cowan*, 309 U. S. 382, this Court held that appeals under Section 250 of the Bankruptcy Act from orders on allowances may be heard only in the discretion of the Circuit Court of Appeals, and affirmed an order refusing to dismiss an appeal in which leave of the appellate court had been sought and obtained. In the present case, the majority of the court below held that they were constrained, under the *Dickinson* decision, to dismiss the appeals for want of jurisdiction because no formal application for leave to have the appeals allowed was made during the appeal period.

I

In appeals under Section 250, the filing of an application to the Circuit Court of Appeals within the appeal period to have the appeal allowed is not a jurisdictional requirement. Section 250 provides that appeals from orders on allowances shall be "taken" by the appellants "in the manner and within the time provided for appeals" by the Bankruptcy Act. The manner and time of taking bankruptcy appeals are specified in Sections 24 and 25 of the Act, and in Rule 73 (a) of the new Federal Rules of Civil Procedure, which, by virtue of General Order in Bankruptcy No. 36, governs bankruptcy as well as civil proceedings.

Under the provisions of Sections 24 and 25 and of Rule 73 (a), an appeal, whether by right or by leave, is taken by filing in the District Court a "notice of appeal"; once this notice is filed, jurisdiction of the appeal vests in the appellate court. The filing of an application for allowance of the appeal in the case of discretionary appeals is not the "taking" of the appeal, but is simply a further step necessary to secure review. Under the specific provisions of Rule 73 (a), failure to take such a step does not affect the validity of the appeal, but is simply the occasion for such action as the appellate court may deem appropriate. Plainly, therefore, petitioners' action in filing timely notices of appeal conferred jurisdiction on the court below and that jurisdiction was not divested simply because no formal application to have the appeals allowed was filed within the appeal period.

This conclusion is supported by the legislative history of the 1938 amendments to the Bankruptcy Act, which shows that one of the principal purposes sought to be achieved by the amendments was to abrogate the useless formal distinctions between appeals as of right and discretionary appeals which had theretofore caused serious jurisdictional difficulties. To construe the Act so as to prevent the application of Rule 73 (a) to discretionary appeals under Section 250 would be contrary to the expressed policy of Congress and would revive one of the jurisdictional pitfalls which Congress was seeking to eliminate.

Dickinson Industrial Site v. *Cowan, supra,* does not require such a construction of the Act. The only question there considered was whether orders on allowances were reviewable under Section 250 in the discretion of the appellate court or as a matter of right. This Court held that such appeals were reviewable only in the discretion of the appellate court and accordingly affirmed an order refusing to dismiss an appeal in which leave of the appellate court had been in fact sought and obtained. This Court did not hold that the filing of an application within the appeal period to have the appeal allowed was a jurisdictional requirement or that the jurisdiction of the appellate court could not be invoked by the filing of a timely notice of appeal in the District Court. At the time the appeal in that case was taken, the new Rules, providing that a party may take an appeal by filing such a notice, had not yet been made applicable to bankruptcy appeals, and the appeal could only be taken by filing a petition for leave to appeal.

II

Even if it be held that Rule 73 (a) is inapplicable to appeals under Section 250 and that the proper procedure for taking such appeals is to file, within the appeal period, an application to have the appeal allowed, it would still not follow that the court below could not, in the exercise of its discretion, have heard the appeals. Petitioners' error, if

error there was, was at most a technical defect in procedure; it related to the form of their appeals rather than to matters of substance, and it was caused solely by the erroneous decision of the court below in *London* v. *O'Dougherty,* 102 F. (2d) 524. Under these conditions, only an archaic insistence upon matters of form could serve to defeat the power of the court below to allow review.

Even under the old Bankruptcy Act, no such rigid adherence to form was required. In considering appeals under Sections 24 (a) and 24 (b) of the Act, prior to their amendment in 1938, this Court and the Circuit Courts of Appeals consistently ruled that, where the scope of review was not enlarged thereby, an error in selecting the method of appeal should be deemed merely a technical defect, insufficient to defeat review. This rule applies with added force since the enactment of the Chandler Act and the promulgation of the new Rules, one of the purposes of which was to eliminate procedural entrapments. And the rule is directly applicable here since the questions before the court below would have been precisely the same, whether the appeals were treated as taken of right or as taken in the discretion of the appellate court. In these circumstances there is no reason of substance why the appeals taken in the form in which appeals as of right are taken should not have been treated as appeals to be allowed or not in the discretion of the appellate court and disposed of as such.

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III

RFC and the New Corporation filed with the court below, within the appeal period, motions to consolidate certain of the appeals and to have them heard on the original papers, which motions were granted by the court below. The motions contained prayers for general relief. By virtue of the motion papers, the court below had before it all of the relevant information which would have been contained in an application to have the appeals allowed and, on the basis of those papers, it exercised jurisdiction in the case by ordering the appeals consolidated and heard on the original papers. Since the appellate court was apprised of all the relevant facts by papers duly filed in that court within the appeal period, all the substantial requirements for treating those appeals as taken in the discretion of the appellate court were satisfied.

IV

Even if the Court should hold that the method of appeal adopted in this case would preclude review by the appellate court in appeals taken after the decision in the *Dickinson* case, such a result is not necessary here. In the present case the appeals were taken and argued, briefs were filed, and the case was under submission on the merits at the time of the decision in the *Dickinson* case. The method of taking the appeals complied in all respects with the only procedure available to petition-

ers under the controlling decision of the court below in *London* v. *O'Dougherty, supra;* indeed, at the time most of the appeals were taken, the *London* case stood without conflict as the sole guide to litigants. Under these circumstances, we believe it plain that the court below was not compelled to apply, and should not have applied, the *Dickinson* decision retroactively to the instant proceedings.

This Court has never had occasion to decide expressly that the federal courts have the power, where equity requires, to limit the retrospective effect of an overruling decision of this Court. Decisions in closely analogous situations, however, impel the conclusion that the power of the courts to overrule prior decisions carries with it as a necessary incident the power in particular cases to prevent an overruling decision from being an instrument of injustice or hardship. And if the power exists, it should clearly be exercised in this case where petitioners' transgression, if any, was due entirely to the erroneous decision of the court below in the *London* case, and where a limitation on the retroactive application of the *Dickinson* decision would not deprive respondents of any substantial right.

ARGUMENT

In *Dickinson Industrial Site* v. *Cowan,* 309 U. S. 382, this Court held that appeals under Section 250 of the Bankruptcy Act from orders on allowances may be heard only in the discretion of the Circuit

Court of Appeals, and affirmed an order refusing to dismiss an appeal in which leave of the appellate court had been sought and obtained. In the present case, the majority of the court below held that they were constrained, under the *Dickinson* decision, to dismiss the appeals for want of jurisdiction because no formal application to have the appeals allowed had been made to the Circuit Court of Appeals within the time for taking appeals. It is implicit in both the majority and dissenting opinions that, if the court had believed that it had jurisdiction to hear the appeals, it would have done so.[4]

It is our view, which will be developed more fully hereinafter, that the court below erred in believing that the *Dickinson* case decided the question here presented. The *Dickinson* case did not hold, or require a holding, that allowance of the appeal must be sought within the appeal period, or that if the statute requires leaves to be sought within that

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[4] The majority of the court stated (R. 324) that they were "reluctantly forced" to the conclusion that the court had no jurisdiction (R. 324) and that they were therefore "constrained" (R. 326) to dismiss the appeals. Judge A. N. Hand in his dissenting opinion, after referring to *Bryan* v. *Bernheimer*, 181 U. S. 188; *Holden* v. *Stratton*, 191 U. S. 115; and *Taylor* v. *Voss*, 271 U. S. 176, stated (R. 32): "* * * under those decisions we may allow the appeals in the present case, *as we certainly should do if the majority thought jurisdiction existed upon which further action might be founded.*" [Italics supplied.]

period, failure to comply with this statutory requirement is a jurisdictional defect necessitating dismissal of the appeal. When the appeal in the *Dickinson* case was taken to the Circuit Court of Appeals, the Federal Rules of Civil Procedure, substituting the notice of appeal for the customary petition for appeal and order allowing the appeal, had not yet become applicable to bankruptcy proceedings.

It is our position (1) that where, as here, a timely notice of appeal has been filed in the District Court pursuant to the new Federal Rules of Civil Procedure, Section 250 of the Bankruptcy Act does not require that an application for allowance of the appeal be filed within the appeal period in order to vest the appellate court with jurisdiction; (2) that the court below had discretionary power to entertain the appeals even if, under Section 250, an application for allowance of the appeals should have been filed within the appeal period; (3) that the papers filed during the appeal period in the court below regarding certain of the appeals constituted a sufficient basis for the exercise of the court's discretion to allow those appeals; and (4) that in any event, if the rule of the *Dickinson* case is contrary to the foregoing contentions, that decision should not have been applied retroactively to the present case.

I

UNDER SECTION 250 OF THE BANKRUPTCY ACT THE FILING WITHIN THE APPEAL PERIOD OF AN APPLICATION TO HAVE THE APPEAL ALLOWED IS NOT A JURISDICTIONAL REQUIREMENT

Section 250 of the Bankruptcy Act, which became effective on September 22, 1938, provides as follows:

> SEC. 250. Appeals may be taken in matters of law or fact from orders making or refusing to make allowances of compensation or reimbursement, and may, in the manner and within the time provided for appeals by this Act, be taken to and allowed by the circuit court of appeals independently of other appeals in the proceeding, and shall be summarily heard upon the original papers (c. 575, 52 Stat. 840; 11 U. S. C., Supp. V, Sec. 650).

It seems plain that under this section appeals from orders on allowances need only be "taken to" the Circuit Court of Appeals "in the manner and within the time provided for appeals," and that they need not also be "allowed by" the court within the appeal period.[5] The phrase "within the time provided for appeals by this Act," cannot be separated from the immediately preceding phrase "in

[5] With respect to this matter the court below stated (R. 321): "We should not hesitate * * * to hold that a request for allowance within the time limit would serve to give the court jurisdiction, although the request was acted upon later."

the manner and"; both must modify the verb "allowed" or neither does. Sections 24 (b) and 25 of the Act provide for both the manner and time of *taking* an appeal; no provision of the Act, however, specifies the "manner" in which an appeal shall be *allowed* by the appellate court. Since under the Act the phrase "in the manner" cannot modify the verb "allowed" and, therefore, must refer only to the verb "taken," the coordinate and conjoined phrase "within the time" must also be construed to modify only the verb "taken."

Even under Section 24 (b) of the Bankruptcy Act, prior to its amendment in 1938, it was held that an appeal by leave of the appellate court was timely if a petition to have the appeal allowed was filed within the appeal period, although not allowed within that period. *In re Foster Construction Corp.*, 49 F. (2d) 213 (C. C. A. 2d); cf. *United States* v. *Adams*, 6 Wall. 101; *Randall* v. *Foglesong*, 200 Fed. 741 (C. C. A. 6th); *Ross* v. *White*, 32 F. (2d) 750 (C. C. A. 6th). As pointed out in the *Foster Construction* case, any other rule would make the rights of appellants dependent upon the sittings of the appellate court and upon the length of the deliberations by that court necessary to dispose of the motion for leave to appeal.

The issue on this branch of the case, then, is simply whether the appellants have satisfied the requirement of Section 250 that appeals be "taken" by the appellants "in the manner and within the time provided for appeals" by the Act, so that the

appellate court had discretion to allow and hear the appeals.

A. *Under the Act and the Federal Rules of Civil Procedure, an appeal is "taken" by filing a notice of appeal with the district court.*

Section 250, as this Court held in *Dickinson Industrial Site* v. *Cowan, supra,* provides that appeals from orders on allowances require leave of the appellate court; it contains no provision as to how such a discretionary appeal shall be "taken." To the contrary, it states merely that appeals shall be taken "in the manner * * * provided for appeals by this Act." Thus, as the court below recognized (R. 321), there is necessarily made applicable to appeals under Section 250 the provisions of Sections 24 and 25, which are the only sections containing any provisions relating to procedure or jurisdiction on appeal.[6] Section 24 (a) specifically

[6] These sections, which are confined by their terms to bankruptcy proceedings, are made applicable to reorganization proceedings by Section 121 of the Act. See S. Rep. No. 1916, 75th Cong., 3rd Sess., p. 25.

The statement of this Court in *Dickinson Industrial Site* v. *Cowan, supra,* that appeals under Section 250 are "no longer dependent upon § 24" (309 U. S. at 385), when read in its context, means only that despite the provisions of Section 24 permitting appeals as a matter of right where more than $500 is involved, the leave required by Section 250 must still be obtained. The statement was made in answer to the contention of the petitioners in the *Dickinson* case that Congress by Section 24 had created a single test as to whether or not leave of the appellate court was necessary; i. e., whether $500 was involved.

confers appellate jurisdiction upon the circuit courts of appeals and Section 24 (b) provides that such appellate jurisdiction shall be exercised "by appeal and in the form and manner of an appeal." Section 25 provides that appeals shall be taken within 30 days after written notice of the entry of the judgment appealed from.[7]

Section 24 (b), by providing that appellate jurisdiction shall be exercised "by appeal and in the form and manner of an appeal," makes applicable Rule 73 (a) of the new Federal Rules of Civil Procedure since, by virtue of General Order in Bankruptcy No. 36,[8] these Rules govern bankruptcy as well as civil proceedings. Rule 73 (a) provides as follows:

> RULE 73. *Appeal to a Circuit Court of Appeals.*
>
> (a) *How taken.*—When an appeal is permitted by law from a district court to a circuit court of appeals and within the time prescribed, a party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the appellant to take any of the further steps to secure the review

[7] If such notice be not served and filed, Section 25 provides that the appeal period shall be 40 days from the entry of the judgment.

[8] General Order in Bankruptcy No. 36 provides that "Appeals shall be regulated, except as otherwise provided in the Act, by the rules governing appeals in civil actions in the courts of the United States, including the Rules of Civil Procedure for the District Courts of the United States."

> of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule or, when no remedy is specified, for such action as the appellate court deems appropriate, which may include dismissal of the appeal.

Under these provisions, whether the review is to be had as a matter of right or in the discretion of the appellate court, an appeal is taken when the appellant files with the District Court a notice of appeal. Section 24 alone provides for the appellate jurisdiction of the Circuit Courts of Appeals in bankruptcy matters and it specifies that such jurisdiction "shall be exercised by appeal and in the form and manner of an appeal." And Rule 73 (a) provides that the form and manner of appeal shall be by filing with the District Court a notice of appeal. There is no provision in the Act or in the Rules for taking an appeal by filing with the appellate court an application to have the appeal allowed and no provision for the "form and manner" of such an application. Consequently, the application to have the appeal allowed is simply one of the "further steps to secure the review of the judgment," failure to take which, under Rule 73 (a), "does not affect the validity of the appeal but is ground only * * * for such action as the appellate court deems appropriate." In this view, the present appeals were timely since, as pointed out in the Statement, *supra*, p. 5, appellants filed

notices of appeal with the District Court within the appeal period provided by Section 25.

As we shall point out below, it was one of the purposes of the new Rules, in conjunction with which the 1938 amendments to the Act must be construed,* to provide for the taking of appeals in all cases by the filing of a "notice of appeal" and thus to abolish the old method, applicable in both appeals as of right and in discretionary appeals, of invoking appellate jurisdiction by filing

*The new Rules were adopted by this Court on December 20, 1937, and were presented to Congress at the beginning of the 1938 session, during which the Chandler Act was debated and enacted. They were to become effective automatically three months after the adjournment of the session (Rule 86). Rule 81 provided that this Court could make the Rules applicable to bankruptcy proceedings, and the Advisory Committee on the Rules, in a report to this Court of April 1937, recommended that they be made so applicable by amendment of the General Orders in Bankruptcy. This Court adopted that recommendation and made the new Rules applicable to bankruptcy proceedings by a revision of General Order in Bankruptcy No. 36, effective February 13, 1939.

Prior to its revision, General Order in Bankruptcy No. 36 provided that bankruptcy appeals were to be regulated by the rules governing appeals in equity and thus made applicable to bankruptcy appeals the provisions of the Equity Rules, which were supplanted by the new Federal Rules of Civil Procedure. Since this Court had made the old Equity Rules applicable to bankruptcy cases by General Order in Bankruptcy No. 36, Congress had every reason to believe that the new Rules of Civil Procedure would likewise be made applicable to bankruptcy appeals by amendment of the General Orders, which was done.

a petition for appeal and securing its allowance.[10] The Rules therefore provide that every appeal is "taken" when the notice of appeal is filed in the District Court. The filing of this notice vests jurisdiction of the appeal in the Circuit Court of Appeals, which must hear the appeal if the appellant is entitled to appeal as of right, but which may refuse to allow it if it is discretionary. The important factor for purposes of this case, however, is that once the notice of appeal has been filed, the appeal, of whatever character it may be, is "taken" and jurisdiction of the case vests in the appellate court. Consequently, failure to take any of the further steps to perfect the appeal, such as filing an application for allowance, does not deprive the appellate court of jurisdiction to allow or hear the appeal in its discretion. Indeed, far from imposing as a jurisdictional requirement that an application to have the appeal allowed be filed within the appeal period, the Act and the Rules permit each of the Circuit Courts of Appeals to

[10] The Advisory Committee on the Federal Rules of Civil Procedure specifically stated in the Notes to the Rules that Rule 73 (a) "supplants the petition for appeal, the order allowing an appeal, and the citation on appeal" and that it supersedes Section 228 of the Judicial Code, providing for the method of securing the allowance of appeals.

An example, not involving bankruptcy proceedings, but indicating the necessity of a petition for leave to appeal, prior to the new Rules, may be found in *Alaska Packers* v. *Pillsbury*, 301 U. S. 174, a decision holding that an appeal taken without seeking leave to appeal within the appeal period must be dismissed for want of jurisdiction.

prescribe, by rule or otherwise, the method to be followed in securing the allowance of discretionary appeals. And under Rule 73 (a), failure to file an application for allowance, or to comply with the method prescribed by the appellate court for securing allowance, does not affect the validity of the appeal but is simply occasion for such action as the appellate court deems appropriate, which may include dismissal of the appeal.

No sound reason can be advanced why Rule 73 (a) should not apply to discretionary appeals as well as to other appeals in bankruptcy. There is no distinction drawn in the Act between the scope of review or jurisdiction of the appellate court in the case of appeals taken as of right and in the case of discretionary appeals, and no distinction is made in either the Act or the Rules between the procedures to be followed in taking such appeals. The application of Rule 73 (a) to appeals in bankruptcy which may be taken as a matter of right is not disputed.

B. *Failure to file within the appeal period an application to have the appeal allowed does not divest the appellate court of jurisdiction*

The majority of the court below, in holding that Rule 73 (a) was inapplicable, chose to base its decision upon the authority of a line of cases, decided before the enactment of the Chandler Act and the promulgation of the new Rules, which had held that Section 24 of the old Bankruptcy Act

imposed as a jurisdictional requirement that an application for leave to appeal be made within the appeal period. *In re Torgovnick,* 49 F. (2d) 211 (C. C. A. 2d); *Robie* v. *Hart, Schaffner & Marx,* 40 F. (2d) 871 (C. C. A. 8th); *In re Federal Photo Engraving Corp.,* 54 F. (2d) 628 (C. C. A. 2d); *Holmes* v. *Davidson,* 84 F. (2d) 111 (C. C. A. 9th); *Meyer* v. *Kenmore Granville Hotel Co.,* 297 U. S. 160; cf. *Shulman* v. *Wilson-Sheridan Hotel Co.,* 301 U. S. 172. The reliance of the court below upon this group of decisions was, we submit, fundamental error, because it completely disregarded the basic change in the manner of taking appeals which was made by the Chandler Act and the new Rules.

Analysis of the appeal provisions of the Bankruptcy Act and of the Judicial Code, prior to the 1938 amendments, shows that the "allowance" of appeals formerly served an entirely different function in appellate procedure than it serves under the Bankruptcy Act, as now amended, and under the new Rules. Under the present Act and the new Rules, a single method of invoking appellate jurisdiction is established, in which the "notice of appeal" is substituted for the petition for appeal and the allowance thereof; the legislative history of the 1938 amendments shows that Congress intended by this change to eliminate the jurisdictional pitfalls which were inherent in the old practice.

1. *Appellate procedure prior to the 1938 amendments and the new Rules.*—Prior to the 1938 amendments, appeals in bankruptcy cases were of two kinds. Under Section 24 (a) of the Act, the circuit courts of appeals were vested with appellate jurisdiction over "controversies arising in bankruptcy proceedings." Such "controversies" were appealable as a matter of right and review could be had of both facts and law, but an appeal lay only from a final order. In sharp contrast was the appellate jurisdiction conferred by Section 24 (b), which related to appeals from "proceedings" of courts of bankruptcy. In the case of a "proceeding," an appeal could be taken only with leave of the appellate court and was limited to questions of law, but either a final or an interlocutory order could be reviewed.

Because Section 24 (a) did not prescribe any method for invoking the appellate jurisdiction, appeals under that section were governed, pursuant to former General Order in Bankruptcy No. 36,[11] by the provisions of the Judicial Code applicable to equity cases. The appropriate procedure was to file a petition asking leave to appeal and to procure an order from either the district or a circuit judge "allowing" the appeal. 36 Stat. 1134, 43 Stat. 940, 28 U. S. C. §§ 228, 230; *Alaska*

[11] This General Order provided that "appeals shall be regulated, except as otherwise provided in the Act, by the rules governing appeals in equity in the courts of the United States."

Packers v. *Pillsbury*, 301 U. S. 174; *Farmer's State Bank* v. *Thompson*, 261 Fed. 166 (C. C. A. 5th). Since the appeal was a matter of right, the "allowance" was merely a ministerial act. *Simpson* v. *First National Bank of Denver*, 129 Fed. 257 (C. C. A. 8th); *McCourt* v. *Singers-Bigger*, 150 Fed. 102 (C. C. A. 8th); *In re Graves*, 270 Fed. 181 (C. C. A. 1st). However, because of the mandatory language of Section 230 of the Judicial Code (c. 229, 43 Stat. 936, 940; 28 U. S. C., § 230), providing that no appeal should be allowed unless application therefor be made within three months after entry of the order sought to be reviewed, the filing of such a petition within the appeal period was indispensable to jurisdiction.[12] *Alaska Packers* v. *Pillsbury*, 301 U. S. 174; *McBee* v. *Palmer*, 73 F. (2d) 342 (C. C. A. 9th); *Robie* v. *Hart, Schaffner & Marx, supra*; *Ross* v. *White*, 32 F. (2d) 750 (C. C. A. 6th).

In appealing under Section 24 (b), review was originally sought by a "petition to revise," but by the amendment of 1926 (44 Stat. 664), the petition to revise was abolished and an appeal substituted

[12] Because of Section 25 (a) of the Bankruptcy Act, the appeal period in bankruptcy proceedings was limited to thirty days after entry of judgment, instead of the three months' period provided by Section 230 of the Judicial Code for appeals in civil actions. However, except for the length of the appeal period, the provisions of Section 230 were fully applicable to appeals under Section 24 (a) of the Bankruptcy Act. General Order in Bankrupty No. 36; *McBee* v. *Palmer*, 73 F. 2d 342 (C. C. A. 9th).

therefor. The appeal, however, was only "to be allowed in the discretion of the appellate court." In this type of appeal, as in appeals under Section 24 (a), the filing of a petition for leave was the only way of invoking the appellate jurisdiction, and therefore the provisions of Section 24 (b) that the appellate courts should have "jurisdiction in equity" over appeals "to be allowed in the discretion of the appellate courts" were construed as making the filing of the petition within the appeal period an indispensable jurisdictional requirement. *Deeley* v. *Cincinnati Art Pub. Co.*, 23 F. (2d) 920 (C. C. A. 6th); *In re Torgovnick*, 49 F. (2d) 211 (C. C. A. 2d); *In re Western Women's Club*, 93 F. (2d) 189 (C. C. A. 9th); see Rules of the Circuit Court of Appeals for the Second Circuit, Rule 37. This conclusion followed in any event from the mandatory requirements of Section 230 of the Judicial Code, discussed above, which, under General Order in Bankruptcy No. 36, was equally applicable to appeals under Section 24 (b) as to those under Section 24 (a). *Remington on Bankruptcy* (4th ed.) Vol. 8, Sec. 3811.10. In appeals under Section 24 (b), however, allowance of the appeal was not merely a ministerial act, to be performed either by a district or circuit judge, as in the case of appeals under Section 24 (a); it was rather an exercise of discretion to be performed by the appellate court alone.

It is thus apparent that the only characteristic which was common to appeals under Section 24 (a)

and Section 24 (b) was that in both the filing of an application for leave to appeal was the act which initiated the appeal, and that therefore the filing of such an application within the appeal-period was a jurisdictional requirement. On the other hand, as we have seen, the character of the allowance was different, the method of procedure for securing the allowance was different and the types of orders and scope of questions reviewable were different. And because of these fundamental differences, it was generally held that the two types of appeals were mutually exclusive: a petition for appeal filed under Section 24 (a) could not serve as an application for leave to appeal under Section 24 (b), and *vice versa*.[13]

[13] *Humbler* v. *Bankers' Trust*, 70 F. (2d) 265 (C. C. A. 6th); *Wingert* v. *Spead*, 70 F. (2d) 351 (C. C. A. 4th); *Schnurr* v. *Miller*, 49 F. (2d) 109 (C. C. A. 8th); *American State Bank* v. *Ullrich*, 28 F. (2d) 753 (C. C. A. 8th); *Broders* v. *Lage*, 25 F. (2d) 288 (C. C. A. 8th); *Deeley* v. *Cincinnati Art Publishing Co.*, 23 F. (2d) 920 (C. C. A. 6th). There were two exceptions to the strict rule of exclusiveness of the methods provided in Sections 24 (a) and 24 (b): (1) if an appeal was taken from a "proceeding" on a matter reviewable only on questions of law when a petition to revise was the proper method, nevertheless, if the questions of law were sufficiently presented in the record, the appellate court was permitted to treat the appeal as a petition to revise and to dispose of it accordingly (*Holden* v. *Stratton*, 191 U. S. 115, 118, 119; *Duryea Power Co.* v. *Sternbergh*, 218 U. S. 299, 301); and (2) when the facts were not in dispute, review could be sought by a petition for revision under § 24 (b) as well as by appeal under § 24 (a), even though the judgment appealed from was in a "controversy" as distinguished from a "proceeding." *Taylor* v. *Voss*, 271 U. S. 176.

This situation was thoroughly unsatisfactory. The distinction between "controversies" and "proceedings" was not clearly marked and in many instances there was immense difficulty in determining into which category a given case fell.[14] The result was that in a great many cases meritorious appeals were dismissed simply because counsel had made an unfortunate guess as to which section of the statute would be held applicable. See, *e. g.*, cases cited footnote 13, p. 28, *supra*, and in Appendix to Br. in Opp. pp. 14–16. Another unfortunate result was a huge mass of fruitless litigation on the question of whether a given matter was a "controversy" or a "proceeding," a question of no substantive significance, but on the determination of which the validity of the appeal turned in any given case.

Quite naturally, therefore, when Congress undertook extensive revision of the Bankruptcy Act in 1938, Section 24 became a "storm center for the revisionists." *Dickinson Industrial Site* v. *Cowan*, 309 U. S. 382, 384. The legislative history of the 1938 amendments, as well as the provisions of the Federal Rules of Civil Procedure, show abundantly that it was the earnest desire of their draftsmen to avoid the harsh and arbitrary results which the courts had formerly been compelled to reach and to accomplish this by providing for a single method of appeal.

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[14] See Hunt, *Appeals from the District Courts to the Circuit Courts of Appeals in Bankruptcy Cases*, 42 Commercial L. J. 131.

2. *Legislative history of the 1938 amendments.*—In the hearings on the 1938 amendments the evils of the existing appellate procedure were forcefully brought to the attention of Congress [15] and several

[15] *H. Hearings on H. R. 8046, 75 Cong., 1st Sess.*—Jacob I. Weinstein, a member of the National Bankruptcy Committee, testified: "There has been trouble in appellate practice because of this inherent distinction or difficulty of determining when you are permitted to take an appeal as of right and when you are required to take an appeal as by allowance by the circuit court: * * * And sometimes counsel have been in a quandary to determine when it is a controversy arising out of a bankruptcy proceeding and when it is just a proceeding in bankruptcy" (p. 78). An article by Reuben G. Hunt thoroughly condemning the old practice was incorporated in the record (p. 214) and in his oral testimony Mr. Hunt referred to the old distinctions as "vexatious" and to the old practice as "archaic and unnecessary" (p. 214). Also incorporated in the record before the House Committee was the following statement from the opinion in *Jones* v. *Blair*, 242 Fed. 783 (C. C. A. 4th): "Indeed, it is a reproach to the administration of justice that appellate courts should be required to dismiss causes brought up for review merely because counsel have made a mistake as to purely formal matters. Rule and regularity in such matters are, of course, essential, but due observance of rules could always be enforced by the infliction of costs on the offending party. The difficulty of the bar and the bench in distinguishing and applying these methods we venture to think could be entirely removed so that the appellate courts could in every case decide the merits of the controversy if a simple method of appeal applicable to all cases legal and equitable and all issues arising in the bankruptcy were provided by rule of court under authority of statute, with the discretion of the court to inflict the payment of costs for a material departure from the rule" (p. 216).

S. Hearings on H. R. 8046, 75th Cong., 2d Sess.—Mr. Hunt testified: "Unfortunately, however, this vexatious distinction between controversies arising in bankruptcy proceedings and proceedings in bankruptcy proper—the result has been that

proposed amendments were submitted. All of these amendments sought either to abolish completely the distinction between "proceedings" and "controversies," or, in the alternative, to relieve against the procedural difficulties and, while maintaining the distinction for purposes of the scope of questions and types of orders reviewable, to remove questions as to form in determining whether jurisdiction had been invoked,[16]

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many cases, especially what we might term the border line cases, have been appealed necessarily both ways, that is, as a matter of right by the allowance of the lower court, and as a matter of discretion by the allowance of the appellate court. All this has meant, of course, delay and extra expense. * * * Sometimes the party taking the appeal has made an excusable mistake and his appeal is dismissed for lack of jurisdiction; and the appellate court has now (sic) power to grant relief" (p. 53).

The testimony of William B. Henderson, a member of the American Bar Association Bankruptcy Committee, was to the same effect (p. 103).

Again, Mr. Hunt stated (p. 123): "* * * should there be any discretion on the part of anybody, the litigant should have a right to appeal without any technical restrictions upon such right."

[16] Mr. Hunt's proposal abolished the distinction altogether. H. Hearings on H. R. 8046, 75th Cong., 1st Sess., p. 217. So did Mr. Henderson's proposed amendment, p. 223, and the draft submitted by the Los Angeles Credit Men's Association (p. 406).

The draftsmen of the House bill (H. R. 8046) retained the distinction for the purpose of restricting appeals as of right because "we were afraid ourselves that if we permitted an appeal as of right from every single administrative step in a proceeding that it would only delay and encumber the proceedings." H. Hearings on H. R. 8046, 75th Cong., 1st Sess., p. 79. (But see, *infra*, footnote 18.)

Divergent views were expressed as to whether all bankruptcy appeals should be reviewable as of right or whether some should be discretionary,[17] but no voice was raised against the abolition of the unnecessary difficulties which sprang from the different forms of appeals. Accordingly, while the distinction between "controversies" and "proceedings" was maintained in the bill as passed by the House (H. R. 8046, 75th Cong., 1st Sess.), it was provided specifically that error in the form of an appeal should not affect the jurisdiction of the appellate court.[18] The House bill retained this distinction, then, in order exclusively (1) to differentiate the scope of review in the two situations and (2) to allow the appellate court discretion to refuse to review "proceedings." Under the House bill, however, an application to the appellate court to have the appeal allowed was not a jurisdictional requirement; the bill expressly stated that "where, within the time limited for taking appeals, an appeal has been taken as of right instead of by

[17] S. Hearings on H. R. 8046, 75th Cong., 2d Sess., p. 119.

[18] Section 24 (b) of H. R. 8046: "*And provided further*, That where, within the time limited for taking appeals, an appeal has been taken as of right instead of by allowance of the appellate court, the appellate court may in its discretion allow such appeal at any time before final determination with the same effect as if it had been duly allowed, when taken, and where, within the time limited for taking appeals, an appeal has been taken by allowance of the appellate court instead of as of right, the appellate court may in its discretion entertain and determine such appeal with the same effect as if it had been duly taken as of right."

allowance of the appellate court, the appellate court may in its discretion allow such appeal at any time before final determination with the same effect as if it had been duly allowed, when taken * * *." (Section 24 (b).)

The same result was achieved in a different manner by the Senate amendments to the House bill, which were ultimately embodied in the statute as enacted. Instead of retaining the distinction between "proceedings" and "controversies" and providing that mistakes in procedure should not deprive the appellate court of jurisdiction, the Senate abolished the distinction, except as to the types of orders reviewable.[19] Having done so, it struck out as surplusage the provision in the House bill that mistakes of procedure should not affect jurisdiction. The Senate had the same purpose as the House to do away with the useless formal distinctions which had so frequently caused the dismissal of meritorious appeals. This is shown by the report of the Senate Judiciary Committee (S. Rep. No. 1916, 75th Cong., 3d Sess., p. 4):

> The removal of the troublesome distinction [between appeals as of right and appeals by leave] will be a service to both bench and bar. *It is often difficult to determine the*

[19] Under Section 24 (a) either interlocutory or final orders may be reviewed in *proceedings*, but apparently only final orders can be reviewed in *controversies*. But whatever the type of order reviewed, the appeal is taken in the same manner.

> *proper procedure under the present law and frequently appeals are taken in both ways in order to be certain.* The House bill seeks to remedy this condition by providing that in the event of mistake the appellate court may consider the appeal as properly taken and proceed to a determination of the case. Your committee believes it is much better to eliminate the distinction altogether. (Italics supplied.)

See also the statement by Representative Chandler, in reporting on the changes made in conference, which is to the same effect (83 Cong. Rec. 9106, 75th Cong., 3d Sess.).

3. *Appellate procedure under the 1938 amendments and the new Rules.*—The fact that under Section 250 appeals from orders on allowances must be allowed by the appellate court,[20] is in no way inconsistent with the plain purpose of Congress to establish a single form and manner of appeal so as to avoid the harsh and arbitrary results which was one of the reasons for the 1938 amendments. As we have shown (*supra*, pp. 18 ff.), the form and manner of appeal under Section 250 is precisely the same as the form and manner of appeal under Section 24, appeals under Section 250 simply requiring as an additional step that, after the appeal has been taken by filing a notice of appeal, allowance of the appeal must be secured from the appellate court. The sole comment made by the Senate Judiciary

[20] Similarly, under Section 24 (a) appeals involving less than $500 "may be taken only upon allowance of the appellate court."

Committee with respect to this section was that (S. Rep. No. 1916, 75th Cong., 3d Sess., p. 38):

> Section 250, derived from section 77 (B) (c) (9), is intended to facilitate appeals from the grant or refusal of an allowance of compensation. These are to be disposed of without the necessity of a printed record.

There is nothing in the Act itself, in the legislative history of the Act, or in the new Rules, which in any way suggests that, if a notice of appeal is filed within the appeal period, appellant's failure to file an application for leave with the appellate court within that period is a jurisdictional defect.

The fact that Section 250 provides that appeals from orders on allowances must be "allowed" by the appellate court does not mean that Congress imposed as a jurisdictional requirement that an application for allowance be filed with the appellate court within the appeal period. Nor does it mean that the petition for allowance of the appeal, required under the old procedure, was carried over into the 1938 amendments. The insertion of the provision for allowance was plainly intended merely to permit the appellate court to exercise its discretion as to whether or not the appeal should be heard (cf. *Dickinson Industrial Site* v. *Cowan, supra,*); that it was not intended to provide a separate procedure for vesting the appellate court with jurisdiction is shown by the

express provisions of the section that appeals shall be "taken" in the manner provided by the act.[21]

The contrary holding of the court below fails utterly to take into account the fundamental difference between the procedure for appeal at the present time and the procedure for appeal both prior and subsequent to the enactment of the Chandler Act, but prior to the amendment of General Order in Bankruptcy No. 36, making the new Rules applicable to bankruptcy cases. Prior to the enactment of the Chandler Act, as we have shown, *supra*, the filing of an application for leave to appeal within the appeal period was a jurisdic-

[21] Even under the old procedure, the allowance of an appeal within the appeal period was not a jurisdictional requirement; as we have pointed out (p. 17, *supra*), the appeal was taken, and jurisdiction of the case vested in the Circuit Court of Appeals, as soon as the application for allowance was filed. Indeed, the appeal had to be "taken" before allowance, for otherwise the appellate court would have had no jurisdiction to determine the question of allowance. Consequently, even under the old procedure, the "allowance" was merely the exercise of the appellate court's discretion to hear the appeal; it was not an integral part of "taking" the appeal. Similarly, under the Act, as amended, the provision for allowance of the appeal must be construed, not as imposing a jurisdictional requirement for the taking of an appeal, but as giving the appellate court power in its discretion to refuse to hear the appeal. And plainly, if Section 250 does not make the allowance of an appeal a jurisdictional step in taking the appeal, there is no reason to believe that it made the filing of an application for allowance such a jurisdictional step, or, indeed, that a different procedure for taking appeals under Section 250 was contemplated than the procedure prescribed by Rule 73 (a) for all other bankruptcy appeals.

tional requirement, in appeals as of right because of the mandatory language of Section 230 of the Judicial Code, and in appeals by leave of the appellate court because under Section 24 (b) of the Bankruptcy Act and Section 230 of the Judicial Code, the application to the appellate court was the method of invoking the jurisdiction of that court. And the same procedure was necessarily followed during the short period between the enactment of the Chandler Act and the time when the new Rules became applicable to bankruptcy appeals, because the filing of an application for allowance was then the only "form and manner" of taking appeals. In contrast, the new Rules have eliminated the application for leave to appeal as the method of invoking appellate jurisdiction and have substituted therefor the filing of a "notice of appeal." Consequently, under the Chandler Act, operating in conjunction with the new Rules, the filing of the "notice of appeal" is the only jurisdictional requirement for taking appeals, and the application to have the appeal allowed, in discretionary appeals, becomes merely an additional step to be taken after jurisdiction has vested. In this view of the case it is unnecessary to determine when the petition for allowance of the appeal should be filed.[22] It is important only that failure to file a

[22] Undue delay in seeking allowance of a discretionary appeal may be guarded against by the Circuit Courts of Appeals through rule of court, and may be penalized through application of the sanctions provided for in Rule 73 (a) of the new Rules.

petition within the appeal period is not jurisdictionally fatal.

It is thus apparent that under the procedure prescribed by the Chandler Act and the new Rules, the reasons which formerly made the filing of an application for leave to appeal within the appeal period a jurisdictional requirement have entirely disappeared. To revive this requirement in the case of discretionary appeals, when the reasons for it have gone, as the court below did, is to attribute to Congress an irrational intent to maintain in discretionary appeals the very sort of jurisdictional entrapment which it specifically sought to eliminate in all bankruptcy appeals. This construction of the Act, we submit, has no warrant in the language of Section 250; it is in square conflict with the expressed Congressional policy of abrogating useless formal distinctions and of simplifying appellate procedure by providing for a single method of appeal.[23]

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[23] A construction of the Act which would prevent the application of Rule 73 (a) and thus require a different method of procedure for taking appeals as of right and for taking discretionary appeals would create substantial confusion in a large class of appeals under Section 24 (a) from orders involving no specific sums of money. It is not clear whether appeals from such orders may be taken as of right or are discretionary with the appellate court; the doubt arises under the proviso of Section 24 (a) that appeals from orders involving less than $500 may be taken only upon allowance of the appellate court. Examples of such types of orders are: orders or decrees relating to jurisdiction, stays, contempts, injunctions, fines, imprisonment, appointment or

C. *The Dickinson case does not hold that the filing within the appeal period of an application to have the appeal allowed is a jurisdictional requirement*

The court below believed this Court's decision in *Dickinson Industrial Site* v. *Cowan, supra,* required the ruling that it lacked jurisdiction to hear the appeals because no application to have the appeal allowed had been filed within the appeal period. Such a ruling was, we believe, not required by the *Dickinson* case.

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removal of trustees, granting or denying discharges, dismissal of reorganization proceedings, confirmation of plans, directing liquidation, opening or closing meetings of creditors, and examinations under Section 21 (a). Two Circuit Courts of Appeals have decided that an application for leave to appeal is unnecessary where no specific sum of money is involved. (*Robertson* v. *Berger*, 102 F. (2d) 530 (C. C. A. 2d); *In re Winton Shirt Corporation*, 104 F. (2d) 777 (C. C. A. 3d)), but previously one of those Circuits reached the opposite conclusion (*In re Winton Shirt Corporation*, decision of May 1, 1939, later withdrawn and not reported). Unless the Act be construed so as to provide for a single method of appeal, confusion will remain in this type of case until the exact scope of the proviso in Section 24 (a) is determined and litigants will be faced with the very type of jurisdictional pitfall which it was the purpose of the 1938 amendments to eliminate. In this situation, no appellant can safely rely on a decision of a Circuit Court of Appeals fixing the proper method of appeal. On the one hand, adequate protection could be obtained only by taking appeals, both by leave of the appellate court and by filing a notice of appeal in the District Court. On the other hand, decisions such as *London* v. *O'Dougherty*, 102 F. (2d) 524 (C. C. A. 2d), preclude that protection by denying applications for leave on the ground that they are unnecessary.

The only question considered in the *Dickinson* case was whether orders on allowances were reviewable under Section 250 in the discretion of the appellate court or as a matter of right. The respondents had taken an appeal under Section 250 by filing a petition for leave to appeal in the Circuit Court of Appeals, which the Circuit Court of Appeals had granted. The debtor company (petitioner) moved to dismiss the appeal on the ground that, under Section 250, appeal lay as a matter of right and that therefore appellants could only take their appeal by filing in the District Court a petition for appeal or a notice of appeal. The Circuit Court of Appeals denied the motion to dismiss and this Court affirmed, holding that the appeal lay only in the discretion of the appellate court and that that court had, therefore, properly entertained the appeal. This Court did not hold that appeals under Section 250 could only be taken by filing with the appellate court an application to have the appeal allowed, much less that the filing of such an application within the appeal period was an indispensable jurisdictional requirement where, as here, timely notices of appeal were filed in the District Court.[24]

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[24] The Court stated that the rule of *Shulman* v. *Wilson-Sheridan Hotel Co.*, 301 U. S. 172, that appeals from allowance orders were discretionary with the appellate court, was expressly carried over into Section 250 (309 U. S. at 385). But this statement certainly was not intended to, and did not, carry the implication that the older rule as to the jurisdictional consequences of a technical error in taking the appeal

The court below in the present case pointed out in its opinion that the respondents in the *Dickinson* case had not filed a notice of appeal in the District Court and that this Court had nonetheless held that the Circuit Court of Appeals had jurisdiction of the appeal; it drew from this the conclusion that it is not, as we urge, the filing in the District Court of the notice of appeal which vests the Circuit Court of Appeals with jurisdiction, but the filing in the Circuit Court of Appeals of the petition for leave to appeal.

The court below apparently overlooked the important fact that at the time that the appeal in the *Dickinson* case was taken, the new Rules had not yet been made applicable to bankruptcy proceedings.[25] Accordingly, the old procedure of filing a petition for leave to appeal in the appellate court was still the "form and manner" of taking an appeal which lay only in the discretion of the appellate court. The petition had to be filed within the appeal period, not, however, because of any jurisdictional requirement of Section 250, but because, under Section

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was also embodied in the new Act. Nor is the *Shulman* case in any way inconsistent with our contentions, since that decision, of course, antedated not only the 1938 amendments to the Bankruptcy Act, but also the promulgation of the new Rules.

[25] The appeal to the Circuit Court of Appeals in the *Dickinson* case was taken on November 26, 1938. *In re Albert Dickinson Co.*, 104 F. (2d) 771, 773 (C. C. A. 7th). The new Rules did not become applicable to bankruptcy proceedings until February 13, 1939.

230 of the Judicial Code, this was then the only method of taking the appeal (see pp. 26–27, *supra*). Indeed, the respondents in the *Dickinson* case could not have taken their appeal by filing a notice of appeal in the District Court because at the time of the appeal in that case there was no provision authorizing that procedure in bankruptcy appeals. It necessarily followed, as this Court held, that respondents' failure to file a notice of appeal did not defeat the jurisdiction of the Circuit Court of Appeals.

Moreover, even if under the new Rules jurisdiction can still be vested in the Circuit Court of Appeals by filing a petition for leave to appeal in that court within the appeal period, without filing a notice of appeal in the District Court (*cf. Crump* v. *Hill*, 104 F. (2d) 36 (C. C. A. 5th)), it by no means follows that jurisdiction cannot also be vested in the Circuit Court of Appeals by filing a notice of appeal in the District Court within the appeal period without likewise filing within that period a petition in the appellate court to have the appeal allowed. Certainly there is nothing in the opinion in the *Dickinson* case which intimates that jurisdiction to entertain the appeal may only be had by petition for allowance filed within the appeal period. This Court merely tacitly assumed that the procedure followed by the respondents in that case was proper if the appeal was one which lay only in the discretion of the appellate court.

This assumption, clearly justified under the provisions then governing bankruptcy appeals, is plainly not authority for the proposition that the same procedure is proper under the new Rules, and much less for the proposition that, even if proper under the new Rules, it is the only procedure by which jurisdiction may be vested.

II

EVEN IF UNDER SECTION 250 AN APPLICATION TO HAVE THE APPEAL ALLOWED SHOULD BE FILED WITHIN THE APPEAL PERIOD, THE COURT BELOW HAD POWER IN ITS DISCRETION TO ENTERTAIN THE APPEALS

Even if the contentions advanced in Point I should be rejected and this Court should hold that the proper procedure for taking an appeal under Section 250 is to file with the appellate court within the appeal period an application to have the appeal allowed, it would still by no means follow that the court below could not, in the exercise of its discretion, have heard the appeals. Petitioners' error, if error there was, was at most a technical defect in procedure; it related to the form of their appeals rather than to matters of substance and it was caused solely by the erroneous decision of the court below in *London* v. *O'Dougherty, supra.* Under these conditions, only the most archaic insistence upon "the formalistic rigorism of an earlier and out-moded time" (*Crump* v. *Hill,* 104 F. (2d) 36, 38 (C. C. A. 5th)) could serve to defeat the power

of the court below to hear the appeals in its discretion.

Even under the old Bankruptcy Act, no such rigid adherence to form was required. In considering appeals under Sections 24 (a) and 24 (b) of the Act, prior to their amendment in 1938, this Court and the lower federal courts consistently ruled that, where the scope of review is not enlarged thereby, an error in selecting the method of appeal should be deemed merely a technical defect, insufficient to defeat review. See *Holden* v. *Stratton,* 191 U. S. 115, 119, and cases cited; *Duryea Power Co.* v. *Sternbergh,* 218 U. S. 299, 301; *Taylor* v. *Voss,* 271 U. S. 176, 182; *Baxter* v. *Savings Bank of Utica,* 92 F. (2d) 404 (C. C. A. 5th); *Wilson* v. *Alliance Life Ins. Co.,* 102 F. (2d) 365 (C. C. A. 5th); cf. *Crump* v. *Hill, supra; Crescent Wharf & Warehouse Co.* v. *Pillsbury,* 93 F. (2d) 761 (C. C. A. 9th). This rule applies with added force since the enactment of the Chandler Act and the promulgation of the new Rules, one of the purposes of which, as we have shown, was to eliminate procedural entrapments.

In *Taylor* v. *Voss, supra,* this Court held that, when the facts are undisputed or no longer questioned, review of a "controversy" arising in a bankruptcy proceeding may be secured either by an appeal under Section 24 (a) or by a petition for revision under Section 24 (b), since, in this situation, the scope of review under the two sections

would be identical. In the course of its opinion the Court stated (271 U. S. at 182, 187):

> * * * apart from the scope of the review permitted by the Act, the distinction between an appeal and a petition for revision in the mere matter of form, is immaterial. Thus, although a petition for revision cannot be treated as an appeal for the purpose of enlarging the scope of the review so as to extend to questions of fact, *Duryea Power Co.* v. *Sternbergh, supra* [218 U. S. 299], 302, where a matter which is only reviewable in law is taken up by an appeal, the Circuit Court of Appeals, if the question of law is sufficiently presented on the record, may treat the appeal as a petition for revision and dispose of it accordingly. *Bryan* v. *Bernheimer,* 181 U. S. 188, 193; *Holden* v. *Stratton,* 191 U. S. 115, 118, 119; *Duryea Power Co.* v. *Sternbergh, supra,* 301.
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> This construction of the Act is, we think, consistent with its letter; accords with its spirit and manifest purpose; and gives it a practicable effect removing in large measure the technical question of procedure which has so greatly obstructed its efficient administration and served in so many instances as a trap not intended by Congress, to unwary persons enmeshed in abstruse perplexities.

The foregoing passage, and the decisions cited therein, plainly establish the proposition that the selection of an erroneous method for invoking ap-

pellate jurisdiction does not defeat the jurisdiction of the appellate court to hear the case, in its discretion, if the difference between the method selected and that which should have been selected is merely formal and does not affect the scope of permissible review. That rule is directly applicable here since the questions before the court below would have been the same, whether the appeals were treated as taken of right or as taken in the discretion of the appellate court; as we have pointed out, in all appeals under the amended Act, except appeals from a judgment on a jury verdict, both questions of fact and of law are open for review. Consequently, there is no reason of substance why petitioners' appeals taken as of right could not have been treated as appeals in the discretion of the appellate court and disposed of as such. And had the court below been of opinion that the appeals could have been so treated, there is no doubt that the court would have allowed the appeals. See page 14, *supra*.

Shulman v. *Wilson-Sheridan Hotel Company*, 301 U. S. 172, is distinguishable. In that case an appeal taken as of right under the Bankruptcy Act prior to the 1938 amendments, from an order disallowing a fee for legal services, was held properly dismissed for want of jurisdiction because the appeal should have been taken in the discretion of the appellate court under Section 24 (b). See also *Meyer* v. *Kenmore Granville Hotel Company*, 297 U. S. 160. A holding that an appeal as of right

raising both questions of law and fact cannot be treated as a discretionary appeal raising only questions of law does not support a contention that the same result must follow where, as here, the scope of permissible review is not changed by the method of appeal selected.

III

THE PAPERS FILED WITH THE COURT BELOW DURING THE APPEAL PERIOD REGARDING CERTAIN OF THE APPEALS CONSTITUTED A SUFFICIENT BASIS FOR THE EXERCISE OF THAT COURT'S DISCRETION TO ALLOW THOSE APPEALS

RFC and the New Corporation filed with the court below, within the appeal period, motions to consolidate certain of the appeals (R. 314, 304, 257–259).[26] These motions were granted by the court below and the appeals were ordered heard upon the original papers in the District Court (R. 252).

It is true, as the court below pointed out in its opinion (R. 325), that in filing the motions petitioners did not intend to ask for leave to have the appeals allowed and that in granting the motions

[26] Notes of issue on the motions were filed in the court below, in accordance with its rules, prior to the expiration of the appeal period of the first group of appeals (R. 238, 251). The motion papers in support of the motions were filed on the argument of the motions, which likewise took place prior to the expiration of the time provided for taking all of the appeals except the appeal from the order awarding allowances to the Prudence Securities Advisory Group and its attorneys (R. 314, 304, 301).

the court below did not intend to grant such leave; at that time, neither the petitioners nor the court believed that leave was necessary. Nevertheless, in considering whether the court below had power to allow the appeals, it is significant that, by virtue of the motion papers, the court below had before it, within the appeal period, all of the relevant information which would have been contained in an application to have those appeals allowed, and that, on the basis of those papers, it exercised jurisdiction in the case by ordering the appeals consolidated and heard on the original papers.

The affidavits upon which the motions were made contained full statements of the proceedings in the lower court, the costs of the reorganization and the reasons why petitioners believed the District Court had committed error; the relief requested was not only consolidation of the appeals and their consideration on the original papers, but also "such other and further relief as may be just and proper in the premises" (R. 237, 250). We submit that where, as here, the appellate court has been apprised of all the relevant facts by papers duly filed in that court within the appeal period, all the substantial requirements for treating those appeals as taken have been satisfied.

Crescent Wharf & Warehouse Co. v. *Pillsbury*, 93 F. (2d) 761 (C. C. A. 9th), is clear authority in support of this position. In that case a compensation order under the Longshoremen's and Harbor

Workers' Compensation Act was affirmed by the District Court. The employer and carrier appealed by filing in the District Court a notice of appeal, an assignment of errors and an appeal bond; approval of the bond, which merely recited that the appellants "are about to take an appeal" was secured from the District Judge. In reliance upon a rule of the Circuit Court of Appeals for the Ninth Circuit, no application was made to the District Court for leave to appeal. Thereafter this Court, in *Alaska Packers Association* v. *Pillsbury*, 301 U. S. 174, held that the rule of the Circuit Court of Appeals was invalid and that it was necessary to obtain allowance of appeals by the District Court. The appellees in the *Crescent Wharf* case thereupon moved to dismiss the appeal on the ground that there had been no allowance thereof. The Circuit Court of Appeals denied the motion, holding that, in the absence of any statutory provision as to the form or manner in which appeals should be allowed, the approval of the appeal bond by the District Judge should be treated as, in legal effect, the equivalent of an allowance.

This reasoning requires a similar result in the present case. No statutory provision or rule of court prescribes the manner or form of applying for leave to appeal under Section 250. Consequently, timely notices of appeal having been filed and the appellate court having been advised within the appeal period of all facts relevant to determination of whether or not certain of the appeals

should be heard, there is no valid reason why those appeals should not have been considered as properly taken in the discretion of the appellate court, or why the papers, filed within the appeal period, were not a sufficient basis upon which the discretion of the court below could thereafter be exercised. Such a ruling would not prejudice any substantial rights of the respondents; a contrary ruling would defeat the substantial rights of 35,000 bondholders of the Prudence-Bonds Corporation.

IV

THE DICKINSON CASE SHOULD NOT BE APPLIED RETROACTIVELY TO THE PRESENT CASE

Even if the Court should hold, despite the contentions advanced in the foregoing pages, that the method of appeal adopted in this case would preclude review by the appellate court in the case of appeals taken after the decision in the *Dickinson* case, it by no means follows that such a result is required here.

In this case the appeals were taken and argued, briefs were filed, and the case was under submission on the merits at the time of the decision of this Court in the *Dickinson* case. The method of taking the appeals complied in all respects with the only procedure available to petitioners under the controlling decision of the court below in *London* v. *O'Dougherty;* indeed, at the time most of the appeals were taken, the *London* case stood without conflict as the sole guide to litigants. We submit

that, under these circumstances, the court below was not compelled to apply the *Dickinson* decision retroactively to the instant proceedings.

Only a rigid rule requiring that every decision of this Court be given an unrestrained retroactive application would justify the action of the court below. That there is no such undeviating requirement is indicated by *Chicot County Drainage District* v. *Bank,* 308 U. S. 371, 374, where, in considering the effect of a decision against the constitutionality of a federal statute upon proceedings previously taken under that statute, the Court stated:

> The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects—with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of courts, state and federal, and it is manifest from numerous decisions that an all-inclusive statement of a principle of

absolute retroactive invalidity cannot be justified.

The same rationale should, we believe, be applied in this case. It is unrealistic to say that, because this Court held in the *Dickinson* case that Section 250 had one particular meaning, a decision by a circuit court of appeals to the contrary must be entirely disregarded. When petitioners took their appeals, Section 250, at least in the Second Circuit, did not have the meaning attributed to it in the *Dickinson* case; for all practical purposes it had the exactly opposite meaning attributed to it in the *London* case. The actual existence of the *London* decision was an operative fact upon the basis of which irretrievable action was taken by the petitioners; the overruling of the decision by this Court has, for the future, erased the rule which previously controlled in the Second Circuit, but it has not erased the consequences of that rule upon past transactions.

In these circumstances, no abstract considerations concerning the theoretical nature and effect of an overruling decision by this Court will give a satisfactory answer to the question whether the *Dickinson* decision should be given retroactive application to the present case; the answer must rather be sought, as it was sought in the *Chicot County* case, by a realistic examination of the effect of retroactivity upon the rights of the parties in the particular cause at bar, considered in the light of "prior determinations deemed to have finality

and acted upon accordingly" and of the public policy revealed by "the nature both of the statute and of its previous application" (308 U. S. 374).

So examined, the issue here does not admit of doubt. Petitioners' only transgression was due entirely to the erroneous decision of the court below; rudimentary principles of practical justice require that a transgression so caused should not be penalized by depriving petitioners of their statutory right to have their appeals heard in the discretion of the court below, particularly where the respondents are not thereby deprived of any substantial rights. Cf. *Barber Asphalt Co.* v. *Standard Co.*, 275 U. S. 372, 386. And precedent affords ample authority for meeting this requirement of practical justice by application of the principle of limiting the retroactivity which otherwise would attach to an overruling decision.

1. This Court has never had occasion to decide expressly that the federal courts have the power, where equity requires, to limit the retrospective effect of an overruling decision of this Court. Decisions in closely analogous situations, however, impel the conclusion that the power of the courts to overrule prior decisions carries with it as a necessary incident the power in particular cases to prevent an overruling decision from being an instrument of injustice or hardship.

Great Northern Ry. Co. v. *Sunburst Co.*, 287 U. S. 358, is perhaps the most persuasive precedent. There the Court sustained, against a claim of denial of due process, the action of the Montana

Supreme Court in announcing that, although a previous decision was overruled with respect to transactions thereafter arising, it yet governed the case before the court. The *Sunburst* decision, of course, is not in itself complete authority for the existence of such a power in the federal courts. But it is a decision that the question is one which is to be decided for each state by the "common law as administered by her judges" (p. 365). The full judicial power of the United States is vested in the federal courts. If an incident of the judicial power of a state, in deciding a specific case, is the power to cut off the retroactive effect of an overruling decision where equity requires it, there seems no reason to doubt that such power inheres also in the federal courts.

The *Sunburst* decision was clearly foreshadowed by the decision, two years before, in *Brinkerhoff-Faris Co.* v. *Hill,* 281 U. S. 673. There a taxpayer had brought suit in the state courts to enjoin the collection of a tax on the ground that there had been discrimination in assessment. Under a controlling decision of the state courts, no administrative remedy was available to the taxpayer at the time suit was commenced. In the *Brinkerhoff-Faris* case, however, this earlier decision was overruled by the state Supreme Court, which held that the taxpayer could, and should, have applied to the State Tax Commission for relief and that, because of its failure to do so, it was not entitled to maintain its suit in equity. By the time this decision was

rendered it was too late for the taxpayer to avail itself of the newly found administrative remedy and accordingly it was, in result, deprived of all right to be heard.

This Court reversed the judgment of the state court on the ground that the taxpayer had not been accorded due process of law. It stated (281 U. S. at 682):

> Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.

This Court expressly affirmed the power of the state court to overrule its prior decision (p. 680). Consequently, the error of the state court must have lain simply in the fact that its overruling decision was retroactively applied to a suit brought in reliance upon the previously controlling decision. It is apparent, therefore, that the holding that due process had been denied to the petitioner was necessarily premised on the assumption that the state court not only had power, but in the circumstances presented was required, to give its overruling decision a purely prospective application. This recognition of the inherent power of the courts to limit the retroactivity of their overruling decisions is of persuasive force here, since the result reached

was in no way dependent upon the fact that the case came from the state courts.

Pointing to the same conclusion is the long line of municipal bond cases, typified by *Gelpcke* v. *Dubuque*, 1 Wall. 175.[27] In those cases this Court held that when municipal bonds have been issued and purchased in reliance upon state court decisions holding them valid, the federal courts will not follow a subsequent decision of the state court overruling the earlier cases and holding the bonds invalid. The *Gelpcke* rule seems not to rest upon any constitutional basis,[28] but, rather, to flow from the effort of the federal courts in diverse citizenship cases to control the effect of an overruling state decision; "where gross injustice would be otherwise done, they follow the earlier rather than the later decisions" as to state law. *Tidal Oil Co.* v. *Flanagan*, 263 U. S. 444, 452. In cases where there is a similar necessity to avoid the injustice

[27] See also *Thomas* v. *Lee County*, 3 Wall. 327; *Lee County* v. *Rogers*, 7 Wall. 181; *The City* v. *Lamson*, 9 Wall. 477; *Olcott* v. *The Supervisors*, 16 Wall. 678; *Township of Pine Grove* v. *Talcott*, 19 Wall. 666; *Douglass* v. *County of Pike*, 101 U. S. 677; *Taylor* v. *Ypsilanti*, 105 U. S. 60; *Louisiana* v. *Pilsbury*, 105 U. S. 278; *County of Ralls* v. *Douglass*, 105 U. S. 728; *Green County* v. *Conness*, 109 U. S. 104; *Anderson* v. *Santa Anna*, 116 U. S. 356; *Loeb* v. *Columbia Township Trustees*, 179 U. S. 472.

[28] It may be suggested, however, that the rule rests upon the same considerations of good faith in the relationship between the government and its citizens as underlie the constitutional prohibition against *ex post facto* laws and laws impairing the obligation of contracts.

and inequity which might follow from an overruling decision of this Court, there would seem to be at least an equal measure of judicial discretion in the federal courts to determine how the overruling decision will operate on events that preceded it.

The doctrine of the *Gelpcke* case is not limited to overruling decisions with respect to the validity of state statutes; it applies equally to the reversal of controlling judicial opinion concerning the proper construction of such statutes. Illustrative is *Douglass* v. *County of Pike,* 101 U. S. 677, one of the municipal bond cases, where this Court stated (p. 687):

> The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive.

See also *The Ohio Life & Trust Co.* v. *Debolt,* 16 How. 416, 432, quoted with approval in *Gelpcke* v. *Dubuque, supra,* at 206. It will be noted, too, that the overruling decision of the state court given a prospective application in the *Sunburst* case concerned the construction rather than the validity of a state statute. See *Montana Horse Products Co.* v. *Great Northern Ry. Co.,* 91 Mont. 194, 7 Pac. (2d) 919; *Sunburst Oil & Refining Co.* v. *Great Northern Ry.,* 91 Mont. 216, 7 Pac. (2d) 927.[29]

[29] Typical of other state decisions to the same effect are *State* v. *Haid,* 327 Mo. 567, and *Kelley* v. *Rhoads,* 7 Wyo. 237.

It is not necessary at this time to consider the *Gelpcke* doctrine in the light of its possible intrusion into state affairs not properly the concern of the federal courts. It is sufficient that, whatever its original defects, the doctrine of the *Gelpcke* case has had a strong influence in developing a body of law in the state courts which has permitted a practical and a just effect to be given an overruling decision. The cases are many, the reasoning conflicting and the results varied. But it appears that the *Gelpcke* doctrine, initiated by this Court to preserve the rights of holders of railroad bonds, has grown in the state courts into an equitable doctrine of fairly general application. With a striking degree of uniformity the state courts have followed the implication of the *Gelpcke* rule, and have avoided, by one expedient or another, the retroactive application of an overruling decision to the injury of one who clearly had conducted himself in reliance upon the earlier cases. And the wide acceptance of the doctrine by the state courts has been regarded with approval by a great majority of the legal commentators.[30]

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[30] Cardozo, *Address*, 55 Reports of N. Y. State Bar Ass'n (1932) 263, 293–297; Cardozo, *The Nature of the Judicial Process*, 146–148; Carpenter, *Court Decisions and the Common Law*, 17 Col. Law Rev. 593; Llewellyn, *The Constitution as an Institution*, 34 Col. Law Rev. 1, 37; Hanner, *A Suggested Modification of Stare Decisis*, 28 Ill. Law Rev. 277; Snyder, *Retrospective Operation of Overruling Decisions*, 35 Ill. Law

In Appendix B, *infra,* pp. 76–82, we have endeavored to summarize the state law as accurately as the difficulties of classification make practicable. Grouping together the cases in which a prospective application of the overruling decision was asked in the overruling case itself and those in which it was asked in a third case, we have found 100 cases in which the question has been raised. In 53 cases the court refused to give the new rule a retroactive application; in 41 cases the court gave the new rule retroactive effect but recognized the possibility that under other circumstances it might be held inapplicable to prior transactions; in only six cases has there been a flat refusal to recognize the power to limit the operation of an overruling decision. Measured by jurisdiction, the courts of some 21 states have recognized and applied a power to limit the retrospective operation

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Rev. 121; Freeman, *The Protection Afforded Against the Retroactive Operation of an Overruling Decision*, 18 Col. Law Rev. 230; Kocourek, *Retrospective Decision and Stare Decisis*, 17 A. B. A. J. 180; Notes: *The Effect of an Overruling Decision*, 29 Harv. Law Rev. 80; *Retroactive Effect of an Overruling Decision*, 42 Yale Law J. 779; *Stare Decisis in Criminal Law*, 18 Yale Law J. 422; *Prospective and Retroactive Effect of an Overruling State Decision*, 17 Minn. Law Rev. 811; *Retroactive Operation of an Overruling Decision*, 10 N. Y. U. Q. R. 528.

Only von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 Harv. Law Rev. 409, squarely disapproves. Note, *The Effect of Overruled and Overruling Decisions*, 47 Harv. Law Rev. 1403, doubts the desirability of a widespread application.

of the overruling decision. The courts of six additional states have recognized its applicability under circumstances other than those of the case under consideration, and in only two states where the question has arisen have the courts denied the existence of the power.

No distinction has been drawn, and none is permissible in theory, between the effect to be given an overruling decision on a question of jurisdiction and the effect to be given an overruling decision on other types of questions. Indeed, "There are no cases where an adherence to the maxim of *'stare decisis'* is so absolutely necessary to the peace of society, as those which affect retroactively the jurisdiction of courts." *Marshall* v. *Baltimore and Ohio Railroad Co.,* 16 How. 314, 325. Several of the state court decisions cited in the Appendix relate to jurisdictional questions closely analogous to the present question. *State ex rel. May Department Stores Co.* v. *Haid,* 327 Mo. 567, 586; *Falconer* v. *Simmons,* 51 W. Va. 172, 176–179; see *Jones* v. *Woodstock Iron Co.,* 95 Ala. 551, 563; *Kelley* v. *Rhoads,* 7 Wyo. 237, 279; *cf. Harbert* v. *Railroad Co.,* 50 W. Va. 253, 255–256. The *Haid* case, in particular, presents a striking parallel, for there the Missouri Supreme Court, sitting *en banc,* overruled a previous decision of one of its Divisions prescribing the method of appealing in certain types of cases. The court stated that, in order not to disturb the rights of litigants who had shaped their course of action in conformity with

the overruled decision, the effect of the overruling decision was to be prospective only and was not to affect "the rights, positions, actions and procedure of the parties litigant" in pending proceedings.[31]

Many of the authorities speak in terms of control by the courts of the effect of their overruling decisions. It may be suggested, however, that the analysis might be cast into a more familiar mold. The court which refuses to apply the overruling decision to past transactions does so because, in the particular case presented to it for decision, the litigant had justifiably relied upon the earlier rule. This is not a denial of the new and correct rule, but merely a recognition that the litigant has an equity or a right analogous to an equitable defense, which serves to prevent its application to him. See, *e. g.*,

[31] It is a matter of some significance that the Government has recognized the problem involved in giving retroactive effect to an overruling decision by the legislative or executive branches of the Government, and through legislation or administrative rulings has taken steps to permit unnecessary hardship to be avoided. See Section 209 (b) of the Securities Exchange Act of 1934, c. 404, 48 Stat. 881; Section 1108 (b) of the Revenue Act of 1926, c. 27, 44 Stat. 9; Section 608 of the Revenue Act of 1928, c. 852, 45 Stat. 791; 11 Comp. Gen. 195, 196; 16 Comp. Gen. 221, 222; 66 Treas. Dec., 260, 261, and 66 Treas. Dec., 315, 316 (customs duties). The same broad considerations of justice and equity are present, perhaps in intensified form, with respect to the overruling decisions of this Court.

State v. *O'Neil*, 147 Iowa 513.[32] Just as the equitable lien, the constructive trust, or the equitable estoppel does not contradict the normal rule of law, but serves as a special exception in circumstances where necessary to prevent injustice, so the equity of the litigant who has justifiably relied upon the earlier and mistaken decision serves as a special exception to the application of the general rule of retroactivity.

Mr. Justice Cardozo, in his addresses on "The Nature of the Judicial Process" has explained the character of both the rule and the exception with realistic foresight (pp. 146–149):

> I say, therefore, that in the vast majority of cases the retrospective effect of judge-made law is felt either to involve no hardship or only such hardship as is inevitable where no rule has been declared. I think it is significant that when the hardship is felt to be too great or to be unnecessary, retrospective operation is withheld. Take the cases where a court of final appeal has declared a statute void, and afterwards, reversing itself, declares the statute valid.

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[32] The Supreme Court of Alabama has said that any other result "would be a reproach to the law" (*Hardigree* v. *Mitchum*, 51 Ala. 151, 155), and that persons contracting are presumed to know the existing law, but "neither they nor their legal advisors are expected to know the law better than the courts." *Farrior* v. *New England Mortgage and Security Co.*, 92 Ala. 176.

> Intervening transactions have been governed by the first decision. What shall be said of the validity of such transactions when the decision is overruled? Most courts in a spirit of realism have held that the operation of the statute has been suspended in the interval. It may be hard to square such a ruling with abstract dogmas and definitions. When so much else that a court does, is done with retroactive force, why draw the line here? The answer is, I think, that the line is drawn here, because the injustice and oppression of a refusal to draw it would be so great as to be intolerable. * * * Where the line of division will some day be located, I will make no attempt to say. I feel assured, however, that its location, wherever it shall be, will be governed, not by metaphysical conceptions of the nature of judge-made law, nor by the fetish of some implacable tenet, such as that of the division of governmental powers, but by considerations of convenience, of utility, and of the deepest sentiments of justice.

2. Almost all of the authorities discussed above concern the effect of an overruling by the highest court of the jurisdiction of one of its own previous holdings. But the rationale of decision is fully applicable to the situation here presented, where the overruled case was decided by the Circuit Court of Appeals and the overruling case was decided by this Court. The same considerations of fair dealing and good faith are applicable, as are also the

same factors of reliance on an authoritative decision and the threatened loss of a substantial right acquired thereunder. Had the court below itself overruled the *London* case, it would plainly have had the power, under the authorities above cited, to limit the retrospective effect of its overruling decision. There is no reason in principle or precedent for a different conclusion simply because the rule was changed by this Court rather than by the court below.

As the discussion above shows, it is the change in the controlling rule, and the effect of that change upon parties litigant who justifiably relied upon the earlier rule, which is the occasion for the exercise of the court's discretionary power to limit the retroactive effect of an overruling decision. Under the certiorari practice, the controlling rule applicable in any given case may be established by a decision of a Circuit Court of Appeals as well as by a decision of this Court. Petitioner's reliance upon the *London* case in taking their appeals was just as justifiable and just as inevitable as though that case had been decided by this Court, and the effect of the overruling of that case upon the rights of petitioners was quite as great as though this Court had first interpreted Section 250 as it was interpreted in the *London* case and had then reversed itself. If, therefore, the retroactive effect of a decision of this Court overruling one of its own prior decisions may be limited where equity

requires, the same conclusion must follow in the type of situation here presented.[33]

The authorities cited by respondents (Br. in Opp., pp. 10–11) to the effect that retroactivity will not be denied to a decision of a court of highest jurisdiction overruling an earlier decision by an inferior court are not in point. Cardozo, *The Nature of the Judicial Process,* pp. 147–148; *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U. S. 673, 682; *Sears, Roebuck & Co.* v. *9 Ave.-31 St. Corp.,* 274 N. Y. 388, 400, 401; *Evans* v. *Supreme Council, Royal Arcanum,* 223 N. Y. 497, 503.[34] The reason stated for this limitation is that a person is not normally justified in relying on a judgment of an inferior court; if he chooses to do so, "the chance of miscalculation is felt to be a fair risk of the game of life, not different in degree from the risk of any other misconception of right or duty. He knows that he has taken a chance, which caution often might have avoided." Cardozo, *op. cit., supra,* at 148. Here, however, petitioners had no choice but to rely on the *London* decision which, at the time the appeals were taken, necessarily controlled the procedure for appealing to the court below. Had they filed an application for leave to appeal, as a precaution against the possible overruling of the *London* case, the application

[33] In *Alaska Packers* v. *Pillsbury,* 301 U. S. 174, relied on by the court below, no argument was presented to this Court that the decision should be given only a prospective application.

[34] But see *State* v. *Whitman,* 116 Fla. 196.

would have been summarily denied. Consequently, their reliance upon the *London* decision was not the taking of a chance which caution might have avoided, but was quite as inevitable as though the *London* case had been decided by this Court.

Moreover, the Circuit Courts of Appeals, in the federal judicial system, are courts of highest jurisdiction except in the comparatively few cases where this Court sees fit to require by certiorari that the cause be certified to it for determination. Certainly, the fact that this Court, by certiorari, reviews those decisions of the Circuit Courts of Appeals which are of peculiar gravity and general importance, or which conflict with decisions of other Circuit Courts of Appeals, does not alter the fact that in the vast majority of cases the decisions of the Circuit Courts of Appeals are conclusive and establish the controlling rules of law within their respective jurisdictions. No court which has such power of conclusive determination may properly be classed as an "inferior" court.

With specific reference to the *London* case, we venture the suggestion that counsel would not have been justified, in the absence of a conflict of decisions, in filing a petition for a writ of certiorari from this Court. In practical effect, then, the decision of the court below was that of a court of last resort.

There would seem to be no distinction in this respect between a decision by a Circuit Court of Appeals, such as that in the *London* case, which is

reviewable by certiorari in the discretion of this Court under Section 240 (a) of the Judicial Code, and a decision by the highest court of a state holding a statute invalid under the federal Constitution, which is reviewable by certiorari in the discretion of this Court under Section 237 (b) of the Judicial Code. Yet no one, we submit, would suggest that simply because a decision by the highest court of a State could have been reviewed by this Court in its discretion, the decision was not one by a court of highest jurisdiction, or that an overruling of that decision in a subsequent case could not be given a purely prospective operation.

Every consideration of principle, therefore, points to the conclusion that the power of the federal courts to limit the retroactive effect of an overruling decision by this Court is the same, whether the decision overruled was rendered by this Court or by one of the Circuit Courts of Appeals.

3. There remain only two relatively simple questions of technique: (1) whether the limitation upon retroactivity must be a part of the overruling decision itself or may be imposed in a subsequent action; and (2) if the latter, whether the limitation must be imposed by the court which rendered the overruling decision or may be imposed by another court before which the subsequent action is pending.

There can, we believe, be no doubt that the limitation upon retroactivity need not be imposed in the overruling decision itself. The analysis in Appen-

dix B of the 53 state cases in which the courts refused to give an overruling decision retroactive application shows that in 34 of them the limitation upon retroactivity was imposed in a case other than the overruling case. As we have seen, these cases stem to a large extent from the line of cases typified by *Gelpcke* v. *Dubuque,* where this Court refused to give retroactive effect to overruling decisions by the state courts, even though the overruling decisions did not undertake to limit their own retroactive application.

The reasons why the limitation on retroactivity need not be imposed in the overruling case are obvious. At the time of the rendition of the overruling decision, there is frequently no occasion to inquire as to whether the decision should or should not be made retroactive and, in most situations, there is less warrant for a blanket limitation upon retroactivity than there is for the imposition of a specific limitation in subsequent cases in which the equities may be concretely appraised. In the *Dickinson* case, for example, the Court, although in effect overruling the *London* case, held that the respondents had proceeded properly in taking their appeals and that the appellate court had therefore properly denied petitioners' motions to dismiss. In the light of this holding, no question of the retroactive effect of the decision was or could have been raised before the Court. If, as we believe we have established, the *Dickinson* case should not be given a retroactive application to the case at bar, it is in

this case, and only in this case, that the ruling to that effect can be made.

The second question of technique—whether a circuit court of appeals, or only this Court, can deny retroactive application to an overruling decision of this Court—is of no importance for purposes of decision in the present case, since the case is now before this Court. But, as a theoretical problem, we believe it clear in principle that the court below had power in its discretion to rule that the *Dickinson* case should not be retroactively applied. The issue of retroactivity, as we have seen, is simply whether the equities of the particular case require that the overruling decision be held inapplicable to a prior transaction. That issue can as appropriately be determined by a lower court as by this Court; it is an issue peculiar to each case in which retroactivity is sought to be denied, and its determination is not dependent upon the considerations which determined decision in the overruling case. And since, as we have shown, the declaration of nonretroactivity need not be made in the overruling case, there is no logical reason why it must be made by the court which decided the overruling case. A contrary ruling would mean that every time this Court overruled a prior decision, all litigation affected thereby would have to be brought before this Court in order to determine whether the overruling case should or should not be applied thereto.

Rutland R. R. Co. v. *Central Vermont R. R. Co.*, 63 Vt. 1, appeal dismissed for want of jurisdiction, 159 U. S. 630, is direct authority in support of our position. There the Supreme Court of Vermont refused to apply an overruling decision of this Court retroactively where such retroactive application would have operated to invalidate valuable contract rights acquired under the overruled decision. Since the overruling decision concerned a question arising under the federal Constitution—the validity of a state tax under the commerce clause—the decision was as binding on the state court as the *Dickinson* decision was binding on the Circuit Court of Appeals. See also *Harris* v. *Jex*, 55 N. Y. 421; *Eberle* v. *Koplar*, 85 S. W. (2d) 919 (Mo. App.). It will be noted, too, that in *Gelpcke* v. *Dubuque* and similar cases the doctrine of non-retroactivity was declared by this Court, although both the overruled and overruling cases were decided by the state courts.

4. Respondents urge (Br. in Op., p. 11) that the ruling made in the *Dickinson* case might, had circumstances been different, have been made in the case at bar; that had this been done, the ruling would have had to be applied to the present appeals; and that no different result should follow simply because it was the *Dickinson* case, rather than this one, which first came before this Court. The argument, we submit, is based on the dubious assumption that, had the ruling first been made in the present case, this Court would have rejected

the argument, if one had been made, that the decision should be given a purely prospective operation. All of the contentions advanced in the preceding pages would have been of equal force in supporting a declaration by this Court that no retrospective application was to be given to its ruling; rejection of those contentions here cannot be premised upon the assumption that they would have been rejected had the present case preceded the *Dickinson* case to this Court.[35]

[35] It is true that if the present case had preceded the *Dickinson* case to this Court and this Court had announced the same rule which it announced in the *Dickinson* case, but had declared that it was to apply only prospectively, the announcement of the rule would, technically, have been dictum. But no "case or controversy" question would have been presented since there would have been a contest both as to content of the correct rule and as to whether the rule, if unfavorable to the petitioners, should be applied retroactively to cover their case. Moreover, the fact, if it be a fact, that in some unique situations the "case or controversy" requirement might present a barrier to a limitation on the retrospective operation of an overruling decision, does not in any way detract from the force of the arguments in favor of nonretroactivity and should not bar their adoption in other situations where, as here, the case or controversy difficulty does not exist. The reasons for the case or controversy rule are, of course, of an entirely different nature and origin than the reasons for the rule of nonretroactivity; acceptance of the latter rule should not be denied in all cases simply because in some unusual cases the existence of the former rule might possibly preclude it or embarrass its application.

CONCLUSION

The decision of the court below should be reversed and the case should be remanded to the court below for the exercise of that court's discretion as to whether to hear the appeals.

Respectfully submitted.

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APPENDIX A

The Bankruptcy Act, as amended by the Act of June 22, 1938 (c. 575, 52 Stat. 840; 11 U. S. C., Secs. 47, 48, 521, 650):

SEC. 24. JURISDICTION OF APPELLATE COURTS.—a. The Circuit Courts of Appeals of the United States and the United States Court of Appeals for the District of Columbia, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact: *Provided, however,* That the jurisdiction upon appeal from a judgment on a verdict rendered by a jury, shall extend to matters of law only: *Provided further,* That when any order, decree, or judgment involves less than $500, an appeal therefrom may be taken only upon allowance of the appellate court.

b. Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal.

c. The Supreme Court of the United States is hereby vested with jurisdiction to review judgments, decrees, and orders of the Circuit Courts of Appeals of the United States and the United States Circuit Court

of Appeals for the District of Columbia in proceedings under this Act in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted.

SEC. 25. PRACTICE ON APPEALS.—a. Appeals under this Act to the Circuit Courts of Appeals of the United States and the United States Circuit Court of Appeals for the District of Columbia shall be taken within thirty days after written notice to the aggrieved party of the entry of the judgment, order, or decree complained of, proof of which notice shall be filed within five days after service or, if such notice be not served and filed, then within forty days from such entry.

* * * * *

SEC. 121. Where not inconsistent with the provisions of this chapter, the jurisdiction of appellate courts shall be the same as in a bankruptcy proceeding.

* * * * *

SEC. 250. Appeals may be taken in matters of law or fact from orders making or refusing to make allowances of compensation or reimbursement, and may, in the manner and within the time provided for appeals by this Act, be taken to and allowed by the circuit court of appeals independently of other appeals in the proceeding, and shall be summarily heard upon the original papers.

Section 230 of the Judicial Code (43 Stat. 940, U. S. C., Title 28, § 230):

SEC. 230. *Time for making application for appeal.* No appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly

made within three months after the entry of such judgment or decree.

Rule 73 (a) of the Federal Rules of Civil Procedure:

> Rule 73. *Appeal to a Circuit Court of Appeals.*
>
> (a) *How Taken.* When an appeal is permitted by law from a district court to a circuit court of appeals and within the time prescribed, a party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule or, when no remedy is specified, for such action as the appellate court deems appropriate, which may include dismissal of the appeal.

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APPENDIX B

The cases which we have found in the state courts on the question of the retroactive application of an overruling decision may roughly be classified as follows:

I

CASES REFUSING TO GIVE RETROACTIVE APPLICATION TO THE OVERRULING CASE

A. *Contract rights*

1. Question Raised in Third Case: *Hardigree* v. *Mitchum,* 51 Ala. 151, 155; *Farrior* v. *New England Mortgage and Security Co.,* 92 Ala. 176, 181; *Harmon* v. *Auditor of Public Accounts,* 123 Ill. 122, 135; *Willoughby* v. *Holderness,* 62 N. H. 227, 228; *Harris* v. *Jex,* 55 N. Y. 421, 424; *Bradley & Currier Co.* v. *Lally,* 10 Misc. 366, 367; *State ex rel. Herman* v. *Railway Co.,* 11 Ohio C. C. (N. S.) 263, 269; *Hood* v. *Pennsylvania Society,* 221 Pa. 474, 479; *Geddes* v. *Brown,* 5 Phila. 180, 188; *Rutland Railroad Co.* v. *Central Vermont Railroad Co.,* 63 Vt. 1, 23–25.

2. Question Raised in Overruling Case: *Eagle* v. *City of Corbin,* 275 Ky. 808; *Payne* v. *City of Covington,* 276 Ky. 380; *World Fire and Marine Ins. Co.* v. *Tapp,* 279 Ky. 423; *Thomas* v. *State,* 76 Ohio St. 341, 360–361.

B. *Property rights*

1. Question Raised in Third Case: *Ashford* v. *Prewitt,* 102 Ala. 264, 273; *Haskett* v. *Maxey,* 134 Ind. 182; *Stephenson* v. *Boody,* 139 Ind. 60, 65–67; *Ruf* v. *Mueller,* 49 Ind. App. 7; *Lyons* v. *Veith,* 170 La. 915, 919; *Pittsburgh Iron Co.* v. *L. S. Iron Co.,* 118 Mich. 109, 127, writ of error dismissed, 178 U. S. 270; *St. Helen Shooting Club* v. *Carter,* 248 Mich. 376, 379; *Bank of Philadelphia* v. *Posey,* 130 Miss. 825, 826; *Hill* v. *Brown,* 144 N. C. 117, 119; *Threadgill* v. *Wadesboro,* 170 N. C. 641, 644; *Fowle* v. *O'Ham,* 176 N. C. 12, 13; *Bryant Manufacturing Co.* v. *Hester et al.,* 177 N. C. 609, 611; *Wilkinson* v. *Wallace,* 192 N. C. 156, 158; *Bagby* v. *Martin,* 118 Okla. 244, 247–248; *Herndon* v. *Moore,* 18 S. C. 339, 354–357.

2. Question Raised in Overruling Case: *Klocke* v. *Klocke,* 276 Mo. 572; *Barker* v. *St. Louis County,* 340 Mo. 986; *Jones* v. *Williams,* 155 N. C. 179, 189–190; *Harness* v. *Myers,* 143 Okla. 147, 151; *Menges* v. *Dentler,* 33 Pa. 495.

C. *Status*

2. Question Raised in Overruling Case: *Bingham* v. *Miller,* 17 Ohio 445, 448.

D. *Tort*

2. Question Raised in Overruling Case: *Montana Horse Products Co.* v. *Great Northern R. Co.,* 91 Mont. 194, 210–212, 215; *Sunburst O. & R. Co.* v. *Great Northern R. Co.,* 91 Mont. 216, affirmed, 287 U. S. 358; *Continental Supply Co.* v. *Abell,* 95 Mont. 148, 168–171.

E. *Criminal law*

1. Question Raised in Third Case: *People* v. *Ryan,* 152 Cal. 364, 369; *State* v. *Whitman,* 116 Fla. 196; *State* v. *O'Neil,* 147 Iowa 513, 517–521; *State* v. *Longino,* 109 Miss. 125, 133–135; *Dauchey Co., Inc.,* v. *Farney,* 105 Misc. 470, 475–481.

2. Question Raised in Overruling Case: *People* v. *Maughs,* 149 Cal. 253, 263; *Odom* v. *State,* 132 Miss. 3, 6; *State* v. *Bell,* 136 N. C. 674, 677; cf. *State* v. *Fulton,* 149 N. C. 485, 492–493, 497, 507.

F. *Taxation*

1. Question Raised in Third Case: *Shoemaker* v. *City of Cincinnati,* 68 Ohio St. 603, 613; *Price* v. *City of Toledo,* 4 Ohio C. C. (N. S.) 57, 67.

G. *Procedure*

1. Question Raised in Third Case: *Oliver* v. *Lynn Meat Co.,* 230 Mo. App. 1021; *Eberle* v. *Koplar,* 85 S. W. (2d) 919 (Mo. App.).

2. Question Raised in Overruling Case: *Jones* v. *Woodstock Iron Co.,* 95 Ala. 551, 563; *State ex rel. May Department Stores Co.* v. *Haid,* 327 Mo. 567, 586; *Kelley* v. *Rhoads,* 7 Wyo. 237, 279.

II

CASES GIVING RETROACTIVE APPLICATION TO OVERRULING CASE BUT RECOGNIZING POWER TO AVOID SUCH AN APPLICATION UNDER OTHER CIRCUMSTANCES

A. *Contract rights*

1. Question Raised in Third Case: *Alferitz* v. *Borgwardt,* 126 Cal. 201, 208; *Sudbury* v. *Monroe,* 157 Ind. 446, 456–457; *Gross* v. *Whitley,* 158 Ind.

531, 535–536; *Herron* v. *Whitely Castings Co.*, 47 Ind. App. 335–340; *McClure* v. *Owen*, 26 Iowa, 243, 250–253, writ of error dismissed, 10 Wall. 511; *Swanson* v. *City of Ottumwa*, 131 Iowa, 540, 549–550; *Hoven* v. *McCarthy Brothers Co.*, 163 Minn. 339, 343; *Mountain Grove Bank* v. *Douglas County*, 146 Mo. 42, 54–55; *City of Sedalia* v. *Gold*, 91 Mo. App. 32, 39–40; *Keeler* v. *Templeton*, 164 N. Y. Misc. 113; *Ray* v. *Natural Gas Co.*, 138 Pa. 576, 590–591; *Nickoll* v. *Racine Cloak & Suit Co.*, 194 Wis. 298, 303–304.

2. Question Raised in Overruling Case: *State ex rel. Nuveen* v. *Greer*, 88 Fla. 249, 259–260; *Oliver Co.* v. *Louisville Realty Co.*, 156 Ky. 628, 644–645; *Mason* v. *Cotton Co.*, 148 N. C. 492, 510–511.

B. *Property rights*

1. Question Raised in Third Case: *Allen* v. *Allen*, 95 Cal. 184, 199; *Pierce* v. *Pierce*, 46 Ind. 86, 96; *Hibbits* v. *Jack*, 97 Ind. 570, 578; *Center School Township* v. *State ex rel. Board*, 150 Ind. 168; *Thompson* v. *Henry*, 153 Ind. 56, 59–60; *Levy* v. *Hitsche*, 40 La. Ann. 500, 508; *Donohue* v. *Russell*, 264 Mich. 217, 219–220; *Bradshaw* v. *Duluth Imperial Mill Co.*, 52 Minn. 59, 66; *Coats* v. *Riley*, 154 Okla. 291, 296–297.

2. Question Raised in Overruling Case: *Pearson* v. *Orcutt*, 107 Kan. 305.

E. *Criminal law*

1. Question Raised in Third Case: *State* v. *Striggles*, 202 Iowa 1318, 1320.

2. Question Raised in Overruling Case: *Crigler* v. *Shepler*, 79 Kan. 834, 836–842.

F. *Taxation*

1. Question Raised in Third Case: *O'Malley* v. *Sims*, 51 Ariz. 155; *People ex rel. Rice* v. *Graves*, 242 App. Div. 128, aff'd 270 N. Y. 498, certiorari denied 298 U. S. 683; *Theological Seminary* v. *People ex rel. Raymond*, 189 Ill. 439, 455–456; *Yazoo, etc. Railroad Co.* v. *Adams*, 81 Miss. 90, 115–120; *Lewis* v. *Symmes*, 61 Ohio St. 471, 486; *City of Sidney* v. *Cummins*, 93 Ohio St. 328, 334–335; *Laabs* v. *Wisconsin Tax Commission*, 218 Wis. 414.

G. *Procedure*

1. Question Raised in Third Case: *Great Atlantic & Pacific Tea Co.* v. *Scanlon*, 266 Ky. 785; *Norton* v. *Crescent City Ice Mfg. Co.*, 178 La. 135, 141–146; *Koebel* v. *Tieman Coal Co.*, 337 Mo. 561; *Harbert* v. *Railroad Co.*, 50 W. Va. 253, 255–256; *Falconer* v. *Simmons*, 51 W. Va. 172, 176–179; cf. *Keyser's Appeal*, 124 Pa. 80, 87.

2. Question Raised in Overruling Case: *Arkansas State Highway Commission* v. *Nelson Bros.*, 191 Ark 629.

III

UNQUALIFIED REFUSAL TO DENY RETROACTIVE APPLICATION TO OVERRULING CASE

A. *Contract rights*

1. Question Raised in Third Case: *Duke* v. *Olson*, 240 Ill. App. 198; *Stockton* v. *Dundee Manufacturing Co.*, 22 N. J. Eq. 56; *Ross* v. *Freeholders of Hudson*, 90 N. J. L. 522, 527–528; *Lawrence-Cedarhurst Bank* v. *Ruth*, 162 N. Y. Misc. 82; *Storrie* v. *Cortes*, 90 Tex. 283, 286–292.

G. *Procedure*

1. Question Raised in Third Case: *Finley* v. *United Railways*, 238 Mo. 6, 19.

IV

MISCELLANEOUS CASES BEARING ON THE POWER TO AVOID RETROACTIVE APPLICATION OF AN OVERRULING DECISION.

A. In several cases the court has refused to re-examine earlier rulings on the ground that, whatever might be its opinion now, the rights of the party who relied upon the earlier decisions would not retroactively be destroyed by an overruling decision. *County Commissioners* v. *King*, 13 Fla. 451, 462–465; *Straus* v. *City of New Orleans*, 166 La. 1035, 1046; *Hill* v. *Railroad*, 143 N. C. 539, 573–581; *Bond Debt Cases*, 12 S. C. 200, 281–283; *Richardson* v. *Marshall County*, 100 Tenn. 346, 351–352; *State* v. *Mayor of Bristol*, 109 Tenn. 315, 323.

B. The numerous cases refusing to reopen executed transactions when the decisions under which they were made have been overruled may have been influenced by the doctrine under consideration. See, for example, *Troy* v. *Bland*, 58 Ala. 197; *Kenyon* v. *Welty*, 20 Cal. 637; *Commonwealth* v. *Fidelity & Columbia T. Co.*, 185 Ky. 300; *Doll* v. *Earle*, 59 N. Y. 638; *Novara* v. *County of Wyoming*, 144 Misc. 920; *Metzger* v. *Greiner*, 9 Ohio C. C. (N. S.) 364.

C. Two cases are interesting examples of the difficulties into which the courts can sometimes be plunged and from which the power to avoid retroactive application of the overruling decision would,

had it been considered, offer an escape. *Kneeland* v. *City of Milwaukee,* 15 Wis. 454, 691; *People* v. *Tompkins,* 186 N. Y. 413.

D. For a case in which a former ruling was held controlling while at the same time the court served notice that it would not control future cases, see *Southern Grocer Co.* v. *Adams,* 112 La. 60. The court followed this dictum and overruled the earlier case in *Maxwell-Yerger Co.* v. *Rogan,* 125 La. 1, 15.

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